ment for that of the legislature. At present, however, there seems to be but little cause for apprehension on this score, and it will be time enough to consider it when the evil becomes pressing.

The validity of an Apportionment Act may be called in question by either *quo warranto* (Peo. *v.* Canady, 73 N. C., 198), *mandamus* (Peo. *v.* Rice, 31 N. E. Rep., 921), or injunction (State *ex rel.* Att.-Gen. *v.* Cunningham (Wis.), 51 N. W. Rep., 724; S. C., 81 Wis., 440). The proper mode of procedure is, of course, at the relation of the attorney-general; but if that officer refuses to act, then either *mandamus* or injunction may be brought at the relation of a private citizen; for otherwise such a refusal would prevent the people from obtaining redress for such an infringement upon their rights and liberties: Giddings *v.* Blacker (Mich.), 52 N. W. Rep., 944; State *ex rel.* Lamb *v.* Cunningham (Wis.), 53 N. W. Rep., 35. In any case, however, the suit must be brought against an officer who is entrusted with duties in relation to the matter that are purely ministerial. There can be no direct judicial remedy, as against an unconstitutional apportionment, even by and through the extraordinary jurisdiction of the Court, unless the controversy can be made in some form with and against some officer whose duties are ministerial, and who is therefore amenable to the coercive power of the Court to compel execution of its judgment or decree. If the respondent is not, as to the matter in hand, a mere ministerial officer, owing mere ministerial duties, if he is vested with political or discretionary power subject to no limitation, the jurisdiction of the Court cannot be maintained; for the Court will not render a judgment or decree that it has no possible right to enforce." PINNEY, J., in State *v.* Cunningham (Wis.), 51 N. W. Rep., p. 735.

R. D. S.

COMMONWEALTH *v.* TIERNEY. SUPREME COURT OF PENNSYLVANIA.[1]

SYLLABUS.

Liquor License Law—Social Clubs—Device to Evade the License Law.

A wholesale liquor dealer whose license had been withheld, was indicted soon after for selling liquor in the same old bar-room without a license. His defence was that he was not selling on his own account but as steward of the Ellsworth Club, and that no sales were made to any but members of the club unless brought there by members. The club room was only a space of about six feet square, partitioned off from the old bar-room, although over one hundred members were claimed. The building was owned by the defendant, who lived there with his family. All liquors, it was alleged, belonged to the club, merely being dispensed by the defendant as steward. Each member had a key to the club room and paid an initiation fee of twenty-five cents and ten cents as weekly

[1] 24 Atl. Rep., 64; 1 Adv. (Leg. Int.), 584. See Editorial Notes (Infra).

dues. The main object of the club was sociability, and to some extent mental improvement. Its literary department consisted of two daily newspapers and the *Police Gazette*. The members paid the regular retail price for their drinks.

It was held that though it was a club in form, it was in fact a mere sham or device to evade the license laws; a mere bar-room where liquors were sold without a license. "There was a clumsy attempt to disguise its real character and throw over it the protecting mantle of the law. The latter is not so feeble, however, that it cannot pierce such a thin covering as this. . . . The rights of a *bona fide* club are not involved and we prefer to decide only what is legitimately and necessarily before us. . . . Were we to countenance such a sham as this, any man who is refused a license can get a few of his customers to sign a paper constituting themselves a club, rent them his old bar-room, have himself appointed a steward, and by such clumsy device evade the law. We cannot dignify such an association by treating it as a club."

Opinion by PAXSON, C. J.

SOCIAL CLUBS AND THE LIQUOR LAWS.

It is needless to state that clubs are becoming an increasingly important element in modern social life, and that they exist generally throughout the country. Their usual purpose is to provide for the social and intellectual entertainment of their members, and they are chiefly supported and maintained by the fees, dues and assessments required of their members. The transaction of business for profit is rarely, if ever, contemplated. Intoxicating liquors are in many cases bought by clubs and furnished to their members only, at a price fixed by club regulations. The money received in this way is used for maintaining the supply of liquors and paying the cost of their keep and service, and the other expenses of the club. The question of whether or not this method of furnishing intoxicating liquors by a club to its members constitutes a sale within the meaning of a law that requires a license before one can engage in the retailing of such liquor or whether it constitutes a sale within the meaning of statutes prohibiting all sales of intoxicating liquor whatever, has led to many and conflicting decisions. The principal case suggests a natural division of the subject, and for convenience of treatment the decisions will, therefore, be discussed under two heads: first, as they affect clubs formed with the view of evading the requirements or prohibition of liquor laws; and, second, as they affect *bona fide* clubs.

(*a*) *As to Clubs Formed to Evade the Liquor Laws.*—As to these all authorities agree that the courts will not tolerate any attempt whatever to evade the liquor laws by clubs formed for that purpose. The mere formation of a club, whether by way of association or incorporation, will not protect a vendor of liquors from the penalties imposed for selling without a license where the real and transparent character of the transaction, and so understood by the participants, is nothing but the device of an individual to sell liquor without a license and for personal profit. One inquiry must always be whether the organization is *bona fide*, a club with limited and selected membership, and in

which the property is actually owned in common with the rights of common ownership under the rules of the club, or whether the form of the club has been adopted for other purposes, with the understanding that the mutual rights and obligations of the members shall not be while the *substance* of what is done such as the organization purports to create. "By the evasion of the law mentioned, is intended an evasion by means of a form or device, which is apparently legal, is within the prohibition of the statute:" Com. *v.* Pomphret, 137 Mass., 567.

Such a scheme is presented by the case of State *v.* Tindall, 40 Mo. App., 271, where the make-up of a club-room was, in all respects, similar to an ordinary bar-room, and the dram-seeker, by signing articles of association and paying an admission of twenty-five cents, could obtain liquors at the ordinary retail rates from the defendant, who apparently had complete control. It was held to be "such a palpable scheme that the defence was devoid of any merit."

The case of Richart *v.* People, 79 Ill., 85, has been decided to be another example of an attempted evasion. Here, an association, styling itself the "Wheaton Co-Partnership Company No. One," apparently bought out the dram-shop of one of its members, who continued in possession as treasurer of the association. Any person could become a member by purchasing from the treasurer a "Certificate of Co-partnership Investment in the Wheaton Co-Partnership Company No. One," at a cost of one dollar. The certificate was stamped with numbers from one to twenty, and presentation thereof to the treasurer, entitled the holder to liquors or cigars, which were really paid for at the ordinary prices by having the certificates punched at the rate of five cents a number. All purchases and sales were made by the treasurer, who never accounted for, nor was it ever intended that he should account for, the money.

Other specimens of so-called "clubs" that have been treated as mere attempts to evade the liquor laws, are found in the principle case of Comm. *v.* Tierney, 24 Atl. Rep., 64, and the cases of State *v.* Mercer, 32 Ia., 405, and Comm. *v.* Ewig, 145 Mass., 119.

The question of whether any given club is *bona fide*, or an attempted evasion is a matter of fact, and the court has no right to rule, as matter of law, that any such arrangement as the facts may show, was an evasion of the law. It is a question for the jury upon all the facts and under appropriate instruction: Com. *v.* Smith, 102 Mass., 144; Com. *v.* Ewing, 145 Mass., 119; Rickart *v.* People, 79 Ill., 85; Mavemont *v.* State, 48 Ind., 21.

(*b*) *As to Bona Fide Clubs.*—It has recently been said that it would be difficult to find another subject of equal importance and novelty concerning which so large a number of decided cases had left the law in so chaotic a condition. An examination of the cases justifies the assertion. It is impossible to reconcile them either by a comparison of the wording or object of statutes or the interpretation of words, and, therefore, they will be grouped according as they do or do not favor the freedom of the clubs.

1. Cases upholding the right of bona fide clubs to distribute intoxicating liquor among its members for money without a license, notwithstanding the license laws.

This conclusion has been reached by the various cases in two different ways: first, by a technical interpretation of the meaning of the word "sale" employed in license and prohibition acts, and holding it inapplicable to the method of distribution of refreshments used in clubs, and the second, by a liberal interpretation of the whole statute involved, deciding from its spirit and intent, as shown by its general provisions, that it was not intended to apply to the business of selling liquor to the public for profit.

(*a*) Freedom of clubs from the liquor laws through technical interpretation of the word "sale."

A sale is defined to be a transfer of the absolute or general property in a thing for a price in money (1 Benj. on Sales, 1). It is therefore argued that the furnishing by a club of liquors purchased with the money raised from fees and dues of members is not a sale within the meaning of the License Acts, but an equitable arrangement for the distribution of property among co-owners, which each member has a right to enforce by reason of the club's rules and regulations. In other words, some courts maintain that the requirement of the payment of money for liquor used by members is only a recognition of the fact that the tastes and needs of individuals in this respect differ so greatly that the only method of levying an equitable assessment to maintain the supply of refreshments is by requiring the members to pay a sum fixed by the amount of liquor actually used by the individual. This result is somewhat affected by the method of formation of a club, whether it is an association or a corporation.

The first case that arose where the club was an association, as well as the first case upon the subject in general, was Com. *v.* Smith, 102 Mass., 144 (1869). The defendant was indicted under a statute treating as a public nuisance the keeping of any place where liquor was sold without a license. A number of persons composing an unincorporated club advanced a certain sum of money each, thus creating a common fund. The defendant being appointed agent of the club, purchased liquors and other refreshments with the money thus raised, and then distributed checks at the rate of five cents each to the members in proportion to the amount advanced by each. Upon presentation of the checks the defendant would deliver to the holder liquor of corresponding amount. The jury having found that the transaction was *bona fide*, AMES, J., said: "It certainly has happened, and not infrequently, that a number of persons unite in importing wines or other liquors from a foreign country to be divided between them according to some fixed proportion. Certainly the person who should receive them and superintend the division among the contributors in proportion to the purchase money is not a seller of liquors. If the liquors really belonged to the members of the club and had been previously purchased by them, or on their account, of some person other than the defendant, and if he merely kept the liquors for them and to be divided among them according to a previously arranged plan, there would be neither a selling nor a keeping for sale."

The case which is usually quoted as the leading authority for this doctrine is Graff *v.* Evans, L. R. Q. B. D., 373. There the manager

of the Grosvenor Club, a *bona fide* association, was prosecuted for selling without a license, contrary to the English Licensing Act of 1872, which provides that "No person shall sell or expose for sale, by retail, any intoxicating liquor without being duly licensed to sell the same." Liquors and other refreshments were bought with the funds of the club and distributed by the defendant to the members for consumption, at fixed rates, the proceeds going to the general funds of the club. In deciding the case FIELD, J., said: "The question here is, did Graff, the manager who supplied the liquors to Foster, effect a sale by retail? I think not. I think Foster was an owner of the property together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here nor any contract with Graff with respect to the goods. Foster was acting upon his right as a member of the club, not by reason of any new contract, but under his old contract of association, by which he subscribed a sum to the funds of the club and became entitled to have ale and whiskey supplied to him as a member at a certain price. I cannot conceive it possible that Graff could have sued him for the price as the price of goods sold and delivered. There was no contract between two persons, because Foster was vendor as well as buyer. Taking the transaction to be a purchase by Foster of all the other members' shares in the goods, Foster was as much a co-owner as the vendor. I think it was a transfer of a special property, which was not a sale within the meaning of the section." See also Com. *v.* Pomphret, 137 Mass., 564.

Even where the clubs have been incorporated, the same theory that the regulations of the club amount substantially to a method of dividing the property among co-owners subject to an account, has been applied: Seim *v.* State, 53 Md., 566 (1880); Newell *v.* Hemingway, 16 Cox C. C., 604 (1888); State *v.* McMaster, 14 S. E. R., 270 (1891). The only reference to the difference of formation which it would seem should have at least some bearing upon the original ownership of supplies appears in Seim *v.* State, *supra*, where it says, "The society is not an ordinary incorporation, but a voluntary association or club intended for social purposes, and that as the members have a right to secure liquor under the regulations of the club, it is not a sale by way of trade which is taken to be the meaning of the word in the Act.

(*b*) Freedom of clubs from the provisions of license laws through a liberal interpretation of the whole statute.

Here it is maintained that the object of license laws is not to forbid the drinking of liquors, but to regulate the sale subject to penalties. The legislature has the power to prohibit as well as to license. Its control of the subject is complete, and therefore it is its duty to clearly describe the subjects to which the penalties may be applied. These subjects are to be ascertained from the statute taken as a whole, from its intent and spirit, as shown by its omissions, as well as its provisions, and from a due regard to the old law, the mischief and the present remedy. Thus in Barden *v.* Montana Club, 10 Montana, 330, the provision

of the license law that "*All persons* who sell directly or indirectly any spirituous, alcoholic, vinous or malt liquors shall, before the transaction of such business, obtain a license," etc., was very similar as to the subjects to which it was to apply to another portion of the license laws providing for the payment of a certain sum by "*any person* or *persons* who shall keep any house or saloon or room where any game of chance is dealt in or played for money." And since afterwards the legislature had amended the latter to read, "Any person or persons, or *association* of persons, who shall keep any house or saloon or room or *club*-room where any game of chance is dealt in or played for money," it was held, as there was no room for construing the Act relating to gambling games, that "where these distinctions are so carefully preserved, it is a reasonable inference that the legislature did not designate the business of the appellant in framing the law defining licenses." Likewise in Tennessee Club *v.* Dwyer, 11 Lea, 452 (1883) and Piedmont Club *v.* Com., 87 Va., 340 (1891), the respective license laws of these two States were held upon a review of their various provisions to be intended only to require licenses from those persons who engaged in the business (as other merchants) of selling liquor to the public with a view to personal profit.

2. Cases requiring clubs to be licensed—On the other hand it has been settled in even a greater number of jurisdictions that the distribution by a club to members, of liquors for money, has every element of a sale, and that, therefore, they cannot sell without a license under license laws, nor at all under prohibition laws.

The license laws, they say, indicate no purpose or intention of enabling every person, natural or artificial, to obtain a license, and, therefore, the incapacity to receive a license does not exonerate the seller from the penalty of selling without a license.

It is maintained with force that mere good faith cannot grant extra privileges, that there are certain crimes which do not depend upon the intention of the offender and are not ot be distinguished from simple torts, except by the fact that in the one case an individual sues for damages resulting from the private tort, while in the other the State prosecutes for the penalty fixed for the public wrong. In these cases the offence consists in the act done, without regard to the intention with which it is committed. There is no difficulty in attributing to a corporation an offence of this character since it may be committed by the company's agent or servant employed for the purpose.

The whole basis of these divisions is that the distribution of liquor by a club to its members for money is a sale within the meaning of the acts, and, therefore, subject to their provisions. As before, the reasons vary somewhat with the nature of the formation, whether an association or corporation.

As to associations, the first case, U. S. *v.* Wittig, 2 Law, 466, arose under an attempt to subject a *bona fide* club to the U. S. revenue tax upon retail liquor dealers. "There seems to me," said Judge LOWELL, "to be no doubt that the club sells the liquor to its members. Every element of sale is present, the delivery of the beer on the one part,

and the payment on the other. It was argued that at common law a man cannot buy of himself and others. This is a mistake. The common law recognizes such a sale, though if the contract is executory, the common law has no mode of enforcing it."

In State *v.* Neiss, 108 N. C., 787, the steward of the Cosmopolitan Club, an institution of high social standing, was indicted for selling liquor in violation of a local option prohibition statute. The liquor was purchased with money taken from a common fund created by the members treating themselves as unorganized, and were distributed to members at cost. "When in the present case," said CLARK, J., "an individual received drinks for himself and friends, he clearly did not receive the identical liquor which belonged to himself, but he received liquor which belonged mostly to others, and in which he had a minute undivided interest. Before the transaction the money was solely his and the liquor belonged to several. By virtue of the transaction and in exchange for the money the liquor became his sole and separate property. This is surely a sale. It has every element of a sale. . . . The dealing here is simply what is known as co-operation,' which is an arrangement by which a member of an association procures for an association at cost. The object and the effect of co-operation is not to abolish purchases, for the members still buy from the association, but to procure supplies at cost. This transaction is necessarily either a partition in severalty to the tenant in common or a purchase. It is clearly not a partition to each tenant in common of his undivided portion in the common stock, and it is plain that such is not the purpose and intent of the parties, for money is received in exchange, and it is to be used to obtain more liquor." Also Negales *v.* State, 10 So. R. Miss., 574; People *v.* Andrews, 115 N. Y., 427; Marmont *v.* State, 48 Ind., 21.

In incorporated clubs the same result is reached by treating the transaction as a sale by the corporation to an incorporator instead of by a copartnership to a member of the firm. The corporation is a legal entity and the owners of the liquors purchased with its money. As owner, through its servants, it delivers them to the purchaser at their call and charges a price fixed by the corporation. The property in the goods settles and vests in the purchaser and the money is received for and becomes the property of the club. A corporation can make contracts and deal with a corporator precisely as with a stranger, and the contracts thus formed are valid and capable of enforcement. The transaction is therefore a sale of liquors and the wrongdoer is liable to the penalties of the license and prohibition laws: Newark *v.* Essex Club, 53 N. J. L., 99; People *v.* Soule, 74 Mich., 250; State *v.* Lockyear, 95 N. C., 633; Chesapeake Club *v.* State, 65 Md., 446; State *v.* Easton Club, 73 Md., 97; Martin *v.* State, 59 Ala., 34; State *v.* Horasek, 41 Kan., 87; People *v.* Bradley, 11 N. Y. Sup., 94; Kentucky Club *v.* Louisville, 17 S. W. Rep., 745.

The results of the statutes and decisions in the States of Massachusetts and Maryland merit special attention.

It was settled as early as 1869 in the former State by Com. *v.* Smith, *supra*,—followed by Com. *v.* Pomphret, 137 Mass., 564, Com. *v.* Ewig 145 Mass., 119, and Com. *v.* Geary

146 Mass., 189—that the clubs did not "sell" to their members and so were not liable under their license acts. In 1881 it was enacted that "In any town in which the inhabitants vote that license shall not be granted all buildings or places therein used by clubs for the purpose of selling, distributing or dispensing intoxicating liquors to their members and others shall be deemed common nuisances," and in 1887 the statute was extended to cover clubs in places voting for licenses, unless they should first take out a special club license as required by the latter act. Under the "selling, distributing or dispensing" clause of the Act of 1881, it was decided that a place would be equally a nuisance if used by a club either to sell intoxicating liquors to its members or to distribute among its members intoxicating liquors owned by them in common, or to procure for and dispense to its members intoxicating liquors which was bought for and belonged to them individually: Com. *v.* Reber, 152 Mass., 537; Com. *v.* Jacobs, 152 Mass., 276; and Com. *v.* Ryan, 152 Mass., 283. To escape this penalty it would have to appear that the club did not own any liquor; that it neither sold, nor distributed, nor dispensed any; that each member kept at the club—as he might in his dwelling—a private stock of liquor, purchased either by himself or by the steward of the club at his special direction and as his agent and not as the agent of the club, and that payment for the liquor was, in every instance, made with money of the member to the dealer and not to the club or any one for it: 4 Harvard L. R., 183-4.

MAYNE R. LONGSTRETH.

DEPARTMENT OF CRIMINAL LAW AND CRIMINAL PRACTICE.

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COMMONWEALTH *v.* RANDOLPH.[1] SUPREME COURT OF PENNSYLVANIA.

Test of Crime at Common Law—Solicitation to Commit Murder.

The test whether a certain act is a crime at common law is whether it injuriously affects the public police and economy. Therefore, a solicitation to commit murder, accompanied by the offer of a money reward, is indictable as an offence at common law.

[1] Decided January 4, 1892. Reported in 146 Pa., 83.